(3)
FILED
OCT 20 2000

No. 00-299

IN THE

Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT MARK LaCHAPELLE

MARY MADDEN
MADDEN LAW OFFICES
Attorneys for Respondent
Mark LaChapelle
700 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 204-4588

162988

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statutory Provisions Involved	1
Statement of the Case	5
Reasons for Denying the Writ	8
I. Mitten's Petition Requests That This Court Regulate An Area Of Law In Which States Have Historically Been Sovereign.	8
II. If Mitten Is Challenging The Constitutionality Of Minn. Stat. § 518.17, She Did Not Properly Make That Challenge At The State Court Level, And Did Not Comply With The Provisions Of Rule 29(4)(c) In Filing Her Petition For A Writ Of Certiorari.	10
III. Mitten Fails To Distinguish Between Initial Custody Determinations And Final Custody Determinations, And Therefore, Misstates The Appropriate Standard For Awarding Custody.	13
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

Burgess v. Burgess, 913 P.2d 473 (Cal. 1996) 18

Harder v. Harder, 524 N.W.2d 325 (Neb. 1994) .. 18

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) ... 9

In re Burrus, 136 U.S. 586 (1890) 9

In re the Custody of D.M.G. and T.J.G., 951 P.2d 1377 (Mont. 1998) 18, 19

In re the Marriage of Cole, 729 P.2d 1276 (Mont. 1986) 19

In re the Marriage of Francis, 919 P.2d 776 (Colo. 1996) 17, 18

Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991) 17

McAlister v. Patterson, 299 S.E.2d 322 (S.C. 1982) 18

McCarty v. McCarty, 453 U.S. 210 (1981) 9

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 12

Cited Authorities

Page

Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897) 12, 13

Rose v. Rose, 481 U.S. 619 (1987) 9

Stevison v. Woods, 560 So. 2d 176 (Miss. 1990) .. 17

United States v. Lopez, 514 U.S. 549 (1995) 8, 9

United States v. Morrison, Nos. 99-5 and 99-29, 2000 WL 574361 (May 15, 2000) 9

Waldner v. Peterson, 447 N.W.2d 217 (Minn. App. 1989) 11

Watts v. Watts, 971 P.2d 608 (Wyo. 1999) 16

Webb v. Webb, 451 U.S. 493 (1981) 11, 12

Younger v. Harris, 401 U.S. 37 (1971) 12

Statutes:

28 U.S.C. § 2403(b) 11

Minn. Stat. § 257.51, *et seq.* 6

Minn. Stat. § 518.17 ..... *passim*

Minn. Stat. § 518.18 ..... 1, 4, 9, 14, 17

Cited Authorities

Page

Minn. Stat. § 518.131 ..... 1, 14

Minn. Stat. § 518.156 6

Rules:

Minn. R. Civ. App. P. 144 11

Minn. R. Civ. P. 24.04 11

United States Supreme Court Rule 29(4)(c) 10, 11

Other Authorities:

Carol S. Burch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 Fam. L.Q. 245 (1996) 16

Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. Louisville J. Fam. 1 (1995-96) 16

Janet Leach Richards, *Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 24 (1999) 18

STATUTORY PROVISIONS INVOLVED

Denise Mitten's petition to this Court indicates that the Minnesota State statutory provision involved in this case is Minn. Stat. § 518.17, subd. 3(a). However, the statutory provisions that are pertinent to this Court's consideration of Mitten's petition also include Minn. Stat. §§ 518.131, 518.17, subd. (1), and 518.18, subd. (d).

Minn. Stat. § 518.131, provides in pertinent part:

> **518.131 Temporary orders and restraining orders.**
>
> Subdivision 1. In a proceeding brought for custody, dissolution, or legal separation, or for disposition of property, maintenance, or child support following the dissolution of a marriage, either party may, by motion, request from the court and the court may grant a temporary order pending the final disposition of the proceeding to or for:
>
> (a) Temporary custody and visitation rights of the minor children of the parties;
>
> . . .
>
> (h) Restrain one or both parties from removing any minor child of the parties from the jurisdiction of the court;
>
> . . .

Subdivision 7. The court shall be guided by the factors set forth in sections . . . 518.17 to 518.175 (concerning custody and visitation) . . . in making temporary orders and restraining orders.

. . .

Subdivision 9. A temporary order or restraining order:

(a) Shall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding . . .

Minn. Stat. § 518.17, subd. (1), provides as follows:

518.17 Custody and support of children on judgment.

Subdivision 1. **The best interests of the child.** (a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including:

(1) the wishes of the child's parent or parents as to custody;

(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

(3) the child's primary caretaker;

(4) the intimacy of the relationship between each parent and the child;

(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;

(6) the child's adjustment to home, school, and community;

(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(8) the permanence, as a family unit, of the existing or proposed custodial home;

(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;

(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;

(11) the child's cultural background;

(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

(13) except in cases in which a finding of domestic abuse as defined in section 518B.01, has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

Minn. Stat. § 518.18, subd. (d), provides as follows:

518.18 Modification of order.

. . .

(d) If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order unless it finds, upon the

basis of facts, including unwarranted denial of, or interference with, a duly established visitation schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement established by the prior order unless:

(i) both parties agree to the modification;

(ii) the child has been integrated into the family of the petitioner with the consent of the other party; or

(iii) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

STATEMENT OF THE CASE

Appellant's Statement of the Case is so inaccurate and potentially misleading that respondent must restate the facts in their entirety, so that the Court has an accurate version.

The underlying Minnesota State court proceeding consolidated a Minn. Stat. § 257.51, *et seq.*, paternity proceeding with a Minn. Stat. § 518.156 custody proceeding, involving the three parties. All three parties sought custody and/or visitation of the minor child, L.M.K.O.

Petitioner, Denise Mitten, and respondent, Mark LaChapelle, are L.M.K.O.'s biological parents. Mitten and respondent, Valerie Ohanian, resided together in a committed relationship for several years before L.M.K.O. was born until June 1996. Pursuant to a written "Donor Agreement" dated December 8, 1990, Mitten gave birth to L.M.K.O. on January 4, 1993, having been artificially inseminated with sperm donated by LaChapelle.[1] On May 17, 1992, all three parties (and LaChapelle's life partner) signed another agreement stating that Mitten and Ohanian would have physical and legal custody of the unborn child, and LaChapelle and his partner would be entitled to a "significant relationship" with the child. Mitten is L.M.K.O.'s "Mommy;" Ohanian is her "Mama," and LaChapelle was adjudicated L.M.K.O.'s father.

After L.M.K.O.'s birth, Mitten and Ohanian petitioned the trial court to adopt L.M.K.O., which was granted in September 1993. On the petition, the father of the child was identified as "artificial insemination." The trial court was not informed in the adoption proceeding that the donor was known, or of his identity or the parties' written agreements.

LaChapelle visited L.M.K.O. regularly from her birth through August 1994. Mitten and Ohanian then unilaterally

---

1. Contrary to Mitten's Statement of the Facts, LaChapelle did not waive all parental rights; he retained the right to visitation with the minor child.

terminated LaChapelle's contact with L.M.K.O.[2] In September 1994, LaChapelle moved to vacate the adoption, alleging fraud on the court for failure to disclose the parties' agreements. The adoption was vacated in August 1995. At the same time, Mitten was granted temporary custody.

In September 1995, LaChapelle petitioned the trial court for adjudication of paternity of L.M.K.O. In June 1996, Mitten and Ohanian ended their relationship. In August 1996, Mitten moved the trial court for permission to move to Michigan with L.M.K.O. because she had a job offer there. At the same time, Ohanian petitioned for custody of L.M.K.O. The trial court granted Mitten's request, by order dated August 30, 1996, and she and L.M.K.O. moved to Michigan. At the time she was granted permission to move with L.M.K.O. to Michigan, Mitten acknowledged that she was still subject to the trial court's jurisdiction. Ohanian and LaChapelle were later granted visitation four days each month, alternating visits between Minnesota and Michigan.

By order dated June 12, 1997, the trial court adjudicated LaChapelle to be L.M.K.O.'s biological father, and ordered that "interim legal and physical care, custody and control of the minor child" remain with Mitten. In a memorandum attached to that order, the trial court noted that the "prior orders awarding custody to Mitten have been interim orders, pending the outcome of the paternity petition and any evidentiary hearings." The court went on to state that it would "make a determination as to what custody arrangement is in [L.M.K.O.'s] best interest based on the factors listed in Minn. Stat. § 518.17."

---

2. Contrary to Mitten's Statement of the Case, the parties did not agree that "it would be best if he stopped visiting with L.M.K.O."

A custody trial was held in February 1999. By order dated June 3, 1999, the trial court determined that pursuant to Minn. Stat. § 518.17, it was in L.M.K.O.'s best interest to reside in the Twin Cities metropolitan area. The trial court further determined that it was in L.M.K.O.'s best interest to remain in Mitten's primary physical custody, if Mitten resided in Minnesota.

REASONS FOR DENYING THE WRIT

I.

MITTEN'S PETITION REQUESTS THAT THIS COURT REGULATE AN AREA OF LAW IN WHICH STATES HAVE HISTORICALLY BEEN SOVEREIGN.

A discussion of the enumerated powers created by the United States Constitution was set forth by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). Quoting James Madison, this Court noted that " '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Id.* at 551-52 (citation omitted). The Court went on to say:

> This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the

States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Our dual system of government requires a distinction between what authority is national and what authority is local. *Lopez*, *supra*, at 568. This Court has consistently recognized that " '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' " *Rose v. Rose*, 481 U.S. 619, 626 (1987) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

Mitten argues that this Court should grant her Petition to "confront the issue of when a state may constitutionally restrict a custodial parent's choice to move and when it may not." The Minnesota State Legislature made that determination by enacting Minn. Stat. §§ 518.17 and 518.18. The Minnesota Court of Appeals also made that determination in its decision in the present case. Mitten criticizes the State of Minnesota for intruding into the "privacy of her familial relationship with L.M.K.O" via its current statutory scheme, yet asks this Court to essentially begin regulating family law. Granting Mitten's request would move toward creating federal family law, and effectively begin obliterating the distinction between national and local authority. This Court has consistently maintained that distinction. *See, e.g.*, *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 WL 574361 (May 15, 2000).

II.

IF MITTEN IS CHALLENGING THE CONSTITUTIONALITY OF MINN. STAT. § 518.17, SHE DID NOT PROPERLY MAKE THAT CHALLENGE AT THE STATE COURT LEVEL, AND DID NOT COMPLY WITH THE PROVISIONS OF RULE 29(4)(c) IN FILING HER PETITION FOR A WRIT OF CERTIORARI.

Mitten argues that she has brought her Petition so that this Court can "determine whether Minnesota violated her constitutional right to travel and by interfering in the choices she made as a parent." In effect, Mitten is arguing that the trial court's determination that it was in L.M.K.O.'s best interest to reside in Minnesota was unconstitutional because it limited Mitten's right to live in the state of her choosing.

Throughout her arguments to the trial court, to the Minnesota Court of Appeals, to the Minnesota Supreme Court, and to this Court, it has never been clear whether Mitten challenges the constitutionality of Minn. Stat. § 518.17 itself, or the trial court's interpretation of Minn. Stat. § 518.17 after considering the facts of this case. Mitten states that she initially raised the issue of whether Minnesota violated her constitutional rights in her brief to the trial court, and then in her brief to the Minnesota Court of Appeals, which the Court of Appeals addressed.

The Minnesota Rules of Civil Procedure direct that: "When the constitutionality of an act of the legislature is drawn in question, . . . the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford the attorney general an opportunity to intervene." Therefore, if Mitten was challenging the

constitutionality of Minn. Stat. § 518.17 at the trial court level, she was required to notify the Minnesota State Attorney General. Minn. R. Civ. P. 24.04. *See also Waldner v. Peterson*, 447 N.W.2d 217, 219 (Minn. App. 1989). Mitten provided no such notification. By her own admission, Mitten first raised the constitutionality issue in her brief to the trial court. Raising the issue with the trial court, after trial, does not constitute such timely notice to the Minnesota State Attorney General as to afford the attorney general an opportunity to intervene.

If Mitten was challenging the constitutionality of Minn. Stat. § 518.17 at the state appellate court level, she was also required to notify the Minnesota State Attorney General. Minn. R. Civ. App. P. 144. Mitten provided no such notification.

If Mitten is challenging the constitutionality of Minn. Stat. § 518.17 in her Petition to this Court, Rule 29(4)(c) of the Rules of the Supreme Court of the United States required her to state in her petition that 28 U.S.C. § 2403(b) may apply, and to serve a copy of her Petition on the Minnesota State Attorney General. Mitten's Petition contained no such statement, and there is no indication in the record that she served a copy of her Petition on the Minnesota State Attorney General.

This Court has noted that there are "powerful policy considerations" underlying the requirement that a federal challenge to a state statute or other official act be presented first to the state courts. *Webb v. Webb*, 451 U.S. 493, 500 (1981). This Court discussed those policy considerations as follows:

> . . . although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principal of comity requires "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Webb, at 499-500 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

In the present case, Mitten's challenge to the constitutionality of Minn. Stat. § 518.17, and/or the trial court's custody determination pursuant to Minn. Stat. § 518.17 was not properly presented at the state level in the manner prescribed by law. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, *supra*, at 497. *See also New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*,

166 U.S. 648, 655 (1897). Accordingly, Mitten's petition must be dismissed for lack of jurisdiction.

III.

MITTEN FAILS TO DISTINGUISH BETWEEN INITIAL CUSTODY DETERMINATIONS AND FINAL CUSTODY DETERMINATIONS, AND THEREFORE, MISSTATES THE APPROPRIATE STANDARD FOR AWARDING CUSTODY.

The trial court's determination that it was in L.M.K.O.'s best interest to reside in Minnesota was based on the statutory scheme in which custody determinations are made in Minnesota, *i.e.*, Minn. Stat. § 518.17. Mitten argues that the determination interfered with her right to travel, her right to determine her residence, and her right to determine the upbringing of L.M.K.O. Mitten asserts that the "best interest" standard set forth in Minn. Stat. § 518.17 is vague, speculative, and arbitrary, and as a result, "serves very little purpose." She then argues that the only compelling state interest that should allow a court to interfere with that right is protection of the child from detriment and endangerment.

Mitten's argument is based on a single premise. It assumes that a *final* custody award to Mitten had been made prior to the trial court's June 3, 1999 Order. That premise is incorrect. The language the trial court used is clear. Any orders issued prior to June 3, 1999 constituted *interim* determinations regarding legal and physical custody. (Emphasis added.) The June 3, 1999 Order constituted the trial court's final determination of custody. Until that time, Mitten has been awarded only temporary physical custody.

In reviewing Mitten's Petition, this Court must keep the full statutory scheme in which custody determinations are made in Minnesota. As set forth above, Minn. Stat. § 518.131 allows lower courts to determine parties' *temporary* custody and visitation rights in a custody proceeding. In doing so, the statute allows lower courts to prohibit a party from removing a minor child from the jurisdiction of the court pending a final determination of the parties' respective custody and visitation rights. The statute also mandates lower courts not to prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding.

In making both temporary and final custody and visitation determinations, lower courts are required to consider the "best interest" factors set forth in Minn. Stat. § 518.17, subd. 1. There are 13 factors which lower courts must consider in making those determinations. Because it is the care and upbringing of a child at issue, those factors appropriately address what is best for *the child*, not the parties.

In considering whether a final custody determination, made according to what is in a child's best interest, should be disturbed after that determination has been made, Minnesota courts are required to apply the "endangerment standard" set forth in Minn. Stat. § 518.18, rather than the "best interest" standard set forth in Minn. Stat. § 518.17. Pursuant to Minn. Stat. § 518.18, subd. (d), lower courts may not modify a prior custody order unless a substantial change in the circumstances has occurred such that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change

of environment is outweighed by the advantage of a change to the child."

In the present case, after reviewing the "best interest" factors as required by Minn. Stat. § 518.17, the trial court awarded Mitten temporary physical custody during the pendency of the lower court proceeding. As statutorily required, the trial court applied the same best interest standard in making its final custody determination after trial. Mitten did not take issue with the best interest standard when she was awarded temporary custody in August 1996, or in June 1997, when the trial court specifically stated that that award of custody was interim. In fact, she agreed that she was still subject to the trial court's jurisdiction at the time she was granted permission to move with L.M.K.O. to Michigan. Only when Mitten did not like the trial court's final custody determination that required L.M.K.O. to reside in Minnesota, did she argue that the trial court should not have applied the best interest standard. Only then did she argue that L.M.K.O.'s temporary custody and residence arrangement should have been changed *only* if it endangered her.

Mitten argues that the best interests of a child is not a sufficient compelling state interest to permit state involvement in a parent's choice of residence, and in this case, even in the process of making an initial custody determination. She argues that the only sufficient compelling state interest to interfere in a parent's decision regarding residence would be protecting a child from abuse or neglect.

Mitten then launches into a discussion of authorities advocating use of the endangerment standard, rather than the best interest standard in child relocation situations. However, a careful reading of the authorities relied on by

Mitten shows that her reliance is misplaced. Mitten fails to differentiate between relocation cases involving initial custody determinations versus subsequent modification of those initial custody determinations.

As an example, Mitten cites *Watts v. Watts*, 971 P.2d 608 (Wyo. 1999). In *Watts*, the Wyoming Supreme Court upheld a custodial parent's right to relocate her residence with the minor children. However, what Mitten omits from her discussion is that the right was upheld after custody had been conclusively adjudicated, based on the children's best interest, in the parties' dissolution decree. *Id.* at 611, 612. The court determined that, in seeking a modification of that custody adjudication, the non-custodial parent had the burden of establishing that a substantial change in circumstances had occurred, and that the effect of a move would be detrimental to the children. *Id.* at 613, 614.

In support of her argument, Mitten also cites Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. Louisville J. Fam. 1 (1995-96); and Carol S. Burch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 Fam. L.Q. 245 (1996).

LaFrance criticizes courts' use of the best interest standard when considering a request by a custodial parent to relocate the child's residence, and advocates use of the endangerment standard. However, LaFrance's criticism is made in the context of relocation requests made *after* an initial custody decision has been made. In fact, LaFrance acknowledges the necessity of the best interest standard in making initial custody determinations. *Id.* at 8.

Burch and Bowermaster also advocate for the use of an endangerment standard in relocation cases. Again, as does LaFrance, Burch and Bowermaster advocate for the use of that standard specifically in relocation cases arising *after* an award of permanent custody has been made. In fact, they specifically acknowledge Minnesota's statutory scheme requiring a showing of endangerment before a custodial parent can be prevented from relocating with a minor child, but only after an initial determination of custody has been made. *See* Minn. Stat. § 518.18.[3]

In an effort to further convince this Court to accept review of her Petition, Mitten argues that there is also "conflict among the states" regarding which standard (best interest or endangerment) is applied when a custodial parent seeks to move a child's residence out of state. The mere fact that there is a conflict between states on an area of law that is of uniquely state concern is not a valid reason to review a state court decision.

Again, in her discussion, Mitten fails to distinguish between those relocation cases in which an initial custody determination has already been made, and those that involve a subsequent modification of an initial custody determination. In fact, virtually all of the cases cited by Mitten involve a request to relocate a child's residence after an initial custody determination has been made.[4]

---

3. The overriding consideration here, though, is that these scholarly articles are not legal authorities sufficient to justify a request that this Court overrule a state court.

4. Specifically, *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991); *Stevison v. Woods*, 560 So. 2d 176 (Miss. 1990); *In re the* (Cont'd)

Only two cases cited by Mitten involve initial custody determinations: *In re the Custody of D.M.G. and T.J.G.*, 951 P.2d 1377 (Mont. 1998), and *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996). Both those cases support the trial court's and the Minnesota Court of Appeals decisions in the present case.

In *Burgess*, the California Supreme Court held that in an initial custody determination, the proposed relocation of the children by one parent is a necessary consideration in determining what custody arrangement is in the children's best interest. The court's analysis included a discussion distinguishing cases involving an initial custody determination, and those involving a subsequent modification of that determination.

In *D.M.G.*, the unmarried parents of two minor children separated, and the mother then moved out of state with the children. In an initial custody determination, the trial court required the mother to return to Montana if she wanted to maintain custody. On appeal, the Montana Supreme Court concluded that the mother's " 'constitutional right of interstate travel is qualified by the special obligations of

---

(Cont'd)
Marriage of Francis, 919 P.2d 776 (Colo. 1996); *Harder v. Harder*, 524 N.W.2d 325 (Neb. 1994); and *McAlister v. Patterson*, 299 S.E.2d 322 (S.C. 1982). Mitten also cites Janet Leach Richards, *Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 24, 247-251 (1999) for a discussion regarding states' "conflicting" application of the best interests and endangerment standards. However, this article also distinguishes between those relocation cases in which an initial custody determination has already been made, and those that involve a subsequent modification of an initial custody determination.

custody, the state's interest in protecting the best interests of the children and by the competing interests of the non-custodial parent.' " *Id.* at 1383 (quoting *In re the Marriage of Cole*, 729 P.2d 1276, 1280 (Mont. 1986)).

CONCLUSION

For all of the reasons stated above, respondent, Mark LaChapelle, respectfully requests that this Court deny Mitten's petition for a writ of certiorari.

Respectfully submitted,

MARY MADDEN
MADDEN LAW OFFICES
Attorneys for Respondent
Mark LaChapelle
700 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 204-4588